Sheyenne Dakota

April 3, 2009

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW – Room TW-A325
Washington, DC 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25

Dear Ms. Dortch:

Our companies, which make a wide variety of telecommunications equipment, components, and software, write to urge that the Commission re-affirm the policy it adopted during the Clinton Administration of giving price cap-regulated local phone companies flexibility in areas where competition exists to set prices for dedicated broadband transmission circuits (hereafter referred to as "special access" services) and reject proposals to mandate price reductions beyond those that have occurred in the last decade and then re-instate stringent price regulation. We support continuation of the Commission's near decade-old policy to permit pricing flexibility and oppose re-instating price regulation because allowing pricing flexibility helps stimulate broadband investment, while re-instating price regulation could dampen the incentive of telephone companies to invest further in their networks thereby possibly slowing the deployment of broadband services. For obvious reasons, the investment disincentive created by re-imposition of stringent price regulation would be especially great in the present recessionary economic climate. Importantly, the Communications Act expressly authorizes the FCC to consider the impact of a regulatory proposal on infrastructure investment in deciding whether to adopt that proposal.[1]

DISCUSSION

At the request of some CLECs and large corporate users, the FCC, since January 2005, has been looking at the impact on special access service competition of the agency's long-time policy of

1 *See, e.g.*, Sec. 706(a) of Telecom Act of 1996, reproduced under the notes to 47 U.S.C. § 157 (stating that the Commission shall "encourage deployment of advanced telecommunications capacity to all Americans" using methods that "remove barriers to infrastructure development"); *U.S. Telecom Ass'n v. FCC*, 359 F. 3d 554, 580 (D.C. Cir. 2004) (holding that it is lawful notwithstanding the resulting injury to ILEC competitors, for the Commission not to require UNE unbundling if mandatory unbundling "would impose excessive impediments to infrastructure investment"); *Puerto Rico Telephone Authority/GTE Merger*, 14 FCC Rcd. 3122 at ¶ 58 (1999) (finding that the proposed merger at issue in that case was in the public interest in part because it was likely to result in additional infrastructure investment).

giving price cap-regulated local phone companies flexibility to set prices for special access service in areas which the Commission finds are subject to competition from other special access providers. A NARUC-commissioned study by NRRI released in January[2] has become a catalyst for renewed calls to re-regulate special access pricing even though the study provided no basis for re-imposing intrusive regulation. For example, the study itself found that the "evidence does not support a simple 'thumbs up' . . . judgment" that phone companies have the substantial market power that would need to exist to support any reinstatement of price regulation.[3]

Further, while the NRRI study speculated that the telephone industry might have market power because of its supposedly high share of the special access market, it exaggerated the phone industry's market share by overstating the percentage of special access purchases from telcos and by understating the level of competition they face. The study *overstated* purchases of special access from telcos by looking only at the source from which a non-random sample of just six of several thousand special access customers purchased service and then unfairly extrapolated the source of those purchases to the universe of special access customers.[4] The study *understated* the amount of competition to telco-provided special access by failing to treat cable TV and fixed wireless operators as significant competitors[5] as the doctrine of contestable markets requires given that both cable and fixed wireless operators are able to expand their special access offerings quickly and at small incremental cost, as even the authors of the NRRI study admitted.[6]

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[2] Nat. Regulatory Research Inst., "Competitive Issues in Special Access Markets, Revised Edition," No. 09-02, Jan. 21, 2009 "("NRRI study"), avail. at http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf

[3] *Id*. at iii.

[4] *Id*. at 36-38, 41-44.

[5] *Id*. at 48-51.

[6] *Id.* at iv. Not only do these analytical flaws disprove the speculation by the NRRI study that telcos might possibly have market power in the special access market, developments in the marketplace disprove that speculation as well. For example, both cable companies and fixed wireless companies now compete aggressively for special access business. With respect to cable TV, Time Warner Cable's business revenues are growing more than twice as fast as residential revenues, Comcast's business revenue grew during Q3 2008 42 percent more than during the same quarter one year earlier, Cablevision's business revenue was up 48 percent in Q3 2008 from the same quarter one year earlier, and Cablevision's Optimum Lightpath unit, which serves large enterprises, boosted revenue during Q3 2008 by 13 percent from the previous quarter and now serves more than 3,000 buildings with fiber connections. *See* "Cable Gets Down to Business", Heavy Reading (Nov. 20, 2008), avail. at http://www.heavyreading.com/document.asp?doc_id=168367. With respect to wireless, ABI Research reports that there has been "substantial entry and expansion by fixed wireless broadband companies" in providing special access "backhaul" service. *See* ABI Research, "Wireless Backhaul: Bandwidth Explosion and Emerging Alternatives; Metro Ethernet, CATV, Microwave, WiMAX, and Leasing Considerations", at 1-5 (2Q 2006). *See also* ABI Research, "New Mobile Data and Multimedia Services Demand Urgent Planning for Expanded Backhaul Capacity." And Sprint CTO Barry West remarked last year that the only reason fixed wireless backhaul is not used even *more* widely by U.S. cell phone providers is because the telcos' T-1 offerings are so inexpensive. S. Lawson, "Sprint Picks Wireless Backhaul for WiMAX," The Industry Standard (July 9, 2008), avail. at http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax.

The NRRI study's further speculation that special access pricing trends also could possibly show an absence of competition[7] likewise is so wishy-washy as to be meaningless and in any event is wrong. On one hand, for example, the study concluded that because some special access prices have increased over time while others have decreased, it is impossible to reach any "firm conclusion" about whether prices are consistent with a competitive special access market.[8] On the other hand, the study's authors believe that pricing data may "suggest" that the special access market might not be competitive. [9] In fact, however, this latter belief was based on numerous false assumptions whose correction proves that belief to be invalid. For example, the NRRI study claimed that an increase in the nominal price of some telco-provided special access services in some areas between 2001 and 2007 may be evidence that the special access market is not substantially competitive.[10] In fact, if the price changes reported by NRRI during this period are adjusted by the rate of inflation, as they should be in order to determine whether *real* prices went up or down during the period, it is clear that prices in substantially all special access markets declined substantially. An analysis of the NRRI study published this month by NERA[11] reveals numerous other flaws in the NRRI analysis undermining the hazy belief of the study's authors that special access pricing might possibly show that the special access market is non-competitive.[12] The voluminous record in this proceeding likewise provides a myriad of evidence that real prices for special access service have declined consistently throughout this decade, a circumstances that also helps show that the market is competitive.[13]

CONCLUSION

The Commission should reject proposals that it (i) require telephone companies arbitrarily to reduce special access prices beyond the reductions that have occurred in the last decade and (ii) then re-instate price regulation. We oppose re-imposition of stringent price regulation because such regulation is likely to result in decreased network investment by telephone companies. Instead of re-instating price regulation, the FCC should re-affirm its decade-old policy of giving phone companies flexibility in areas where competition exists to set prices as market conditions warrant. We support

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7 *Id.* at 58-68.

8 *Id.* at 59. *See also id*. at 80 ("[o]ur analysis of pricing trends gave inconclusive results").

9 *Id.* at 66.

10 *Id.* at 59-66.

11 NERA Econ. Consulting, Inc., "Is More Special Access Regulation Needed? Reactions to the NRRI Report on Special Access Competition", Mar. 4, 2009, avail. at www.NERA.com/image/PUB_Special_Access_Regulation_03.2009_final.pdf.

12 *Id.* at 3-5.

13 AT&T summarized some of this evidence in a recent letter. *See* AT&T letter dated Feb. 6, 2009 at 5-7 (Dkt. No. 05-25).

continuation of the Commission's long-time policy to permit pricing flexibility because continuing pricing flexibility will help stimulate broadband investment.

Sincerely,

ADC Telecommunications, Inc.
Berry Test Sets Inc.
BTECH Inc.
CBM of America, Inc.
Condux International, Inc.
Enhanced Telecommunications, Inc.
Independent Technologies Corp.
MetroTel Corp.
MRV Communications, Inc.
NSG America Inc.
OFS Fitel LLC
PECO II, Inc.
Preformed Line Products Company
Prysmian Communications Cables and Systems USA, LLC
Sheyenne Dakota, Inc.
SNC Manufacturing Company Inc.
Suttle Apparatus Corp.
Telesync, Inc.
Zeugma Systems Inc.